

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000091-001 DT

04/07/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

DIANA C HINZ

v.

TRACEY L WILLIAMS (001)

JEREMY PHILLIPS

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

PHOENIX CITY COURT

Cit. No. #13003861

Charge: 1. DUI-LIQUOR/DRUGS/VAPORS/COMBO
 2. DUI W/BAC OF .08 OR MORE
 3. EXTREME DUI-BAC .15 OR MORE

DOB: 06/10/73

DOC: 03/16/03

This Court has jurisdiction of this criminal appeal by the State of Arizona pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Sections 12-124(A) and 13-4032.

This case has been under advisement since the time of oral argument on February 9, 2004. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, and the excellent memoranda and oral arguments submitted by counsel.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000091-001 DT

04/07/2004

Appellee, Tracey L. Williams, was arrested and charged on March 16, 2002 with three crimes: (1) Driving While Under the Influence of Alcohol, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); (2) Driving With a Blood Alcohol Content in Excess of .08, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and (3) Extreme DUI, a class 1 misdemeanor, in violation of A.R.S. Section 28-1382. Appellee filed a motion to dismiss the charges claiming that the State would not be able to prove the necessary elements of the statutory method for admission of breath test results because calibration checks and quality assurance procedures indicated a problem with the Intoxilyzer machine used on Appellee six weeks after her test. The court held an evidentiary hearing on Appellee's Motion to Dismiss on January 13, 2003. At the conclusion of the evidentiary hearing, the trial judge (the Honorable Carol Scott Berry, Phoenix City Court Judge) granted Appellee's motion in part and suppressed all evidence of the breath test, finding that Appellee's due process rights had been violated because no second breath sample was preserved by the State for independent testing by Appellee or her counsel. Thereafter, Appellant (the State of Arizona) moved to dismiss the charges without prejudice in order to pursue their right to appeal. Appellant has filed a timely Notice of Appeal in this case.

The only issue presented for review to this court is whether the trial judge erred in granting Appellee Williams' motion and suppressing the results of the breath test. Admittedly, there was a factual dispute between both parties' experts as to whether the breath test results would be admissible pursuant to the statutory method. The trial judge concluded that the Intoxilyzer test results would not be admissible pursuant to the statutory method of admitting such test results, and there is substantial evidence within the record to support this finding. However, it clearly appears from the record that the breath test results would have been admissible pursuant to State ex rel. Collins v. Seidel (Deason, Real Party in Interest).¹ The trial judge also concluded that, as a matter of law, that the prosecution had a duty to preserve a second breath sample in this case. The prosecution's failure to do this, denied Appellee Williams' her rights of due process, the trial judge reasoned. For the reasons explained in this opinion, this Court concludes that the trial judge correctly and appropriately determined that the breath test results would not be admissible pursuant to the statutory method.² However, the trial judge erred in precluding Appellant from introducing the breath test results pursuant to State ex rel. Collins v. Seidel (Deason, Real Party in Interest)³, because Appellee had no due process right to a second breath sample under Arizona law.

Though disputed by the parties in this case, the appropriate standard of review for this court is *de novo*, as the only issue to be addressed involves an analysis of Arizona case law and an application of that law to the legal issues in this case.⁴

¹ 142 Ariz. 587, 691 P.2d 678 (1984).

² The evidence was conflicting from each party's expert as to whether the Intoxilyzer machine was operating in a reliable and trustworthy manner at the time of Appellee's breath test. Substantial evidence exists within the record to support the trial judge's conclusion that the breath test results would not be admissible pursuant to the statutory method.

³ *Supra*.

⁴ See, State v. Winegar, 147 Ariz. 440, 711 P.2d 579 (1985).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000091-001 DT

04/07/2004

In Moss v. Superior Court⁵, the Arizona Court of Appeals held:

Given the reliability and accuracy of replicate testing with an Intoxilyzer 5000, we do not believe that due process or fundamental fairness requires the State to provide defendants with breath samples.

In light of the acknowledged technical development of the Intoxilyzer 5000, the focus inherently shifts from the breath sample to the machine itself and its proper operation for the due process debate to be relevant. We agree with the United States Supreme Court in Trombetta⁶ that defendants' due process rights are not violated by denying them independent samples, since defendants still have sufficient means of raising a meaningful challenge to the test results.

The Arizona Court of Appeals affirmed Moss in State v. Bolan⁷, and the court explained:

...we reject defendant's argument that Moss incorrectly followed California v. Trombetta (citation omitted), which defendant contends our Supreme Court had previously held was not applicable in Arizona. In Moss, we stated that we agreed with the United States Supreme Court decision in Trombetta that due process does not require additional breath samples be given to DUI suspects "since defendants still have sufficient means of raising a meaningful challenge to the test results." (citation omitted)⁸

And, the court in Bolan explained:

Tests performed on the Intoxilyzer 5000 are so accurate that additional breath samples "no longer add anything 'meaningful' to the opportunity to present a defense." (citation to Moss omitted). We noted, however, that a DUI suspect has a right to seek an independent test and also may challenge the Intoxilyzer test results "by showing calibration errors, operator errors, however slight, and/or extraneous conditions, such as dieting or

⁵ 175 Ariz. 348, 352, 857 P.2d 400, 404 (App. 1993).

⁶ 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

⁷ 187 Ariz. 159, 927 P.2d 819 (1996).

⁸ 187 Ariz. at 161, 927 P.2d at 821.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000091-001 DT

04/07/2004

medical treatment, that might affect the outcome of testing for individual defendants.” (citation omitted).⁹

This Court notes that both Moss and Bolan did not involve facts where the criminal defendant accused of DUI challenged the reliability of the replicate breath testing procedures. However, both cases’ reasoning is clearly applicable to this case as there is no reason to believe that an additional breath sample would provide anything “meaningful” to Appellee Williams in this case. The lack of an additional breath sample does not prevent or preclude Appellee Williams from offering the testimony of an expert (such as the expert’s opinions submitted to the trial court at the hearing on Appellee’s motion). Appellee Williams would have every opportunity at trial to raise a “meaningful challenge to the test results.”¹⁰ More importantly, Appellee will have the opportunity to challenge the Intoxilyzer breath results in exactly the manner described by Moss and Bolan:

...by showing calibration error, operator errors, however slight, and/or extraneous conditions, such as dieting or medical treatment, that might affect the outcome of testing for individual defendants.¹¹

The replicate testing by the Intoxilyzer 5000 provides for multiple breath alcohol tests separated by an air blank. As such, the replicate testing is a second sample of a DUI suspect’s breath. This Court concludes that additional breath samples would add nothing to Appellee Williams’ opportunity to present a defense. Appellee Williams’ defense of calibration errors is undiminished and not affected by the lack of a second breath sample. Therefore, the trial judge erred in finding a due process violation and suppressing all evidence of the Intoxilyzer test results.

IT IS THEREFORE ORDERED reversing the order of the trial judge suppressing the results of the Intoxilyzer 5000 in this case, under the circumstances and limitations described in this opinion (the breath test results are not admissible under the statutory method, but may be admitted pursuant to Deason).

IT IS FURTHER ORDERED remanding this file back to the Phoenix City Court for purposes of permitting Appellant to refile charges.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

⁹ 187 Ariz. at 162, 927 P.2d at 822.

¹⁰ Moss v. Superior Court, 175 Ariz. at 352, 857 P.2d at 404.

¹¹ Id., at 354, 857 P.2d at 406; State v. Bolan, 187 Ariz. at 162, 927 P.2d at 822.